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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1436

THE OIL SHALE CORPORATION; ENERGY RESOURCES TECHNOLOGY LAND, INC.; JOSEPH B. UMPLEBY; WASATCH DEVELOPMENT CO.; BARNETT T. NAPIER; GRACE A. SAVAGE; JOAN L. SAVAGE; MAUDE B. FARNUM; ST. CLAIR NAPIER CATLIN; WILLIAM H. FARNUM, JR.; JOHN R. FARNUM; JOHN W. SAVAGE; NEIL S. MINCER; GARDNER C. CATLIN; ELIZABETH YOUNG FARNUM HINDS; and PENELOPE CHASE BROWN, individually and as Trustee, *Petitioners,*

v.

THOMAS S. KLEPPE, Secretary of the Interior, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

THOMAS S. KLEPPE, Secretary of the Interior, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners ask that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on September 22, 1975.

OPINIONS BELOW

The decision of the Court of Appeals, which has not been published, appears in the Appendix hereto. The opinion of the District Court for the District of Colorado was rendered December 19, 1973, and is reported at 370 F.Supp. 108.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 22, 1975. A timely petition for rehearing or rehearing *en banc* was denied without opinion on February 11, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the refusal of the Court of Appeals to rule on the merits of these already protracted cases until after the conclusion of undefined administrative proceedings violates the mandate of this Court in *Hickel* v. *Oil Shale Corp.*, 400 U.S. 48 (1970), which remanded a specific issue to the lower courts for judicial determination.

2. Whether the *sua sponte* refusal of the Court of Appeals to rule on the merits of these cases on the grounds that before the issue which is ripe for judicial decision is decided, issues not raised by either side in prior administrative proceedings or in the courts should first be decided in further administrative proceedings, comports with sound principles of judicial administration and basic fairness to the litigants.

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STATEMENT OF THE CASE

These consolidated cases involve a dispute between the Department of the Interior and petitioners over the effectiveness of administrative determinations in the 1930's that certain oil shale mining claims were invalid. Some of these mining claims were the subject of patent applications filed as far back as 1956, and the dispute concerning the effectiveness of the prior administrative decisions was the subject of administrative proceedings before the Department of the Interior from 1962-64. Since then, the same dispute has been in the courts for 12 continuous years, including review on the merits by this Court which reversed the judgment of the lower court and remanded these cases for further proceedings. *Hickel* v. *Oil Shale Corp.*, 400 U.S. 48 (1970).

1. Prior Proceedings

A brief review of the origin of petitioners' mining claims and the history of this litigation may be helpful to an understanding of how the decision below violates this Court's mandate in *Hickel* and delays rather than expedites the ultimate resolution of this important test case.

Prior to 1920, the public lands in the Western States were subject to oil shale mining claim location, and, upon voluntary application, patent under the General Mining Act of 1872 (30 U.S.C. §§ 22, 26, 28 and 29). All of the claims involved in this case were located in northwestern Colorado before 1920 in accordance with that Act. In 1920, the Mineral Lands Leasing Act (30 U.S.C. § 181 *et seq.*) withdrew oil shale and other enumerated minerals from subsequent location under the mining laws and substituted a leasing system, ex-

pressly preserving, however, pre-existing valid claims for oil shale and other newly leasable minerals (30 U.S.C. § 193).

Under the mining laws thus applicable to the claims in suit, as "established by innumerable decisions of this Court" (*Wilbur* v. *Krushnic*, 280 U.S. 306, 316 (1930)), the location of an oil shale claim in conformity with the law

> has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States . . . The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent (*id.* at 316-317).

During the 40 years from 1920 through 1960, Interior patented over 2,300 oil shale claims. Early in the 1960's, however, Interior officials decided to attempt to stop patenting oil shale claims. They undertook two measures to this end. First, in February, 1962, they caused their subordinates in Colorado to reject summarily, without notice or hearing, 16 patent applications. The sole justification given for this action was that the oil shale claims involved had been invalidated for assessment work default in numerous identical administrative contests around 1930, and that with the passage of years those invalidations had acquired finality even though it was conceded that those Interior decisions had been erroneous (*The Oil Shale Corporation* v. *Morton*, 370 F.Supp. 108, 115-116 (D.

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Colo. 1973)). On "appeal" to themselves in 1964, they affirmed these rejections in principle, excepting only the extent to which the assessment work contests had lacked personal jurisdiction or had been otherwise procedurally defective or incomplete. *Union Oil Co. of California*, 71 I.D. 169 (1964), *Supplemental Decision*, 72 I.D. 313 (1965).

Secondly, on April 17, 1964 (the same day the initial *Union Oil* decision was handed down), Interior decided to attack all remaining oil shale claims on the ground that oil shale had never been a "valuable mineral" within the meaning of the mining laws and hence, no oil shale claim was or ever could have been valid. This novel theory was asserted in contest complaints filed in September 1964 against 9 oil shale claims (in 2 patent applications) that had never been found in assessment work default.[1]

Prior to 1964, The Oil Shale Corporation (TOSCO) and Energy Resources Technology Land, Inc. (ERTL), had acquired (by purchase or lease) interests in certain oil shale claims for which no patent applications had been filed. These claims had been involved in assessment work contests around 1930, and, as in hundreds of similar contests, the claims had been declared invalid by Interior for failure to comply with the assessment work requirements of the mining laws. Those decisions, however, were rescinded by Interior

[1] These contests were tried on a consolidated basis, and 10 years later, on June 28, 1974, Interior's Board of Land Appeals, reversing on appeal the decision of an administrative judge, rendered a final decision that oil shale had never been a valuable mineral. *United States* v. *Wingar, et al.*, 16 I.B.L.A. 112, *suit for judicial review pending sub nom. Shell Oil Co., et al.* v. *Morton*, C.A. No. 74-F-739 (D.Colo.).

in 1935 following the decisions of this Court in *Wilbur* v. *Krushnic,* 280 U.S. 306 (1930), and *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U.S. 639 (1935), that Interior lacked jurisdiction to invalidate mining claims for failure to perform assessment work. *The Shale Oil Company,* 55 I.D. 287 (1935).

Following Interior's 1964 decision in *Union Oil* that those old rescinded contest proceedings had acquired finality by the passage of time, TOSCO and ERTL became concerned that they might be held guilty of laches or estoppel if they did not promptly challenge that ruling.[2] Since it was obviously futile to file patent applications for these claims, TOSCO and ERTL promptly sought direct judicial relief by filing a declaratory judgment action in the District Court for the District of Colorado on July 15, 1964.

The *TOSCO* complaint alleged a number of different grounds for the ineffectiveness of the old assessment work decisions: (1) Interior had lacked subject matter jurisdiction, as this Court had ruled in *Wilbur* v. *Krushnic,* 280 U.S. 306 (1930), and *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U.S. 639 (1935); (2) after its reversals in *Krushnic* and *Virginia-Colorado,* Interior had set aside and cancelled all prior assessment work decisions; (3) from 1935 to the 1960's, Interior had maintained in effect a regulation that the assessment work decisions were null and void; and (4) personal jurisdiction had been defective in the assessment work contests.

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[2] Indeed, Interior held in the *Union Oil* case that because the claimants failed to request Interior to vacate the erroneous cancellation of their claims following the 1935 decision in *The Shale Oil Case,* they were barred by principles of estoppel and laches from attacking those contest determinations.

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Interior moved to dismiss, arguing failure to exhaust administrative remedies, primary jurisdiction, and absence of a justiciable controversy. The motion was denied, *TOSCO* v. *Udall,* 235 F.Supp. 606 (D.Colo. 1964), and Interior did not press those arguments thereafter in any subsequent appeals. The *TOSCO* action was carried forward in the District Court with three similar actions (now consolidated with *TOSCO*) which sought reinstatement of patent applications that had been rejected in the 1964 ruling in *Union Oil.* The answers filed by Interior in all four cases denied the material allegations of the complaints and contended judicial review was not available at this time on the basis of the doctrines of laches and estoppel. After extensive discovery and trial, the District Court ruled in favor of petitioners on the sole ground that the 1930 assessment work decisions of Interior were void because it lacked subject matter jurisdiction (261 F. Supp. 954 (1966)) and the Court of Appeals affirmed on that ground (406 F.2d 759 (1969)). Neither court reached the other grounds advanced by petitioners for prevailing.

On appeal this Court, likewise deciding the four actions on the merits, reversed on the ground that Interior did have subject matter jurisdiction to determine whether there had been a lack of "substantial compliance" with the assessment work requirements. After noting that petitioners had argued that the 1930 contests were invalid on additional substantive and procedural grounds, this Court stated:

> These contentions present questions not decided below. Therefore, on remand all issues relevant to the current validity of those [1930] contest proceedings will be open, including the availability of

> judicial review at this time. To the extent that they are found void, not controlling, or subject to review, all issues relevant to the invalidity of the claims will be open, including inadequate assessment work, abandonment, fraud, and the like. Likewise all issues concerning the time, amount, and nature of the assessment work will be open so that the claimants will have an opportunity to bring their claims within the narrow ambit of *Krushnic* and *Virginia-Colorado* as we have construed and limited these opinions. (400 U.S. at 58) (Opinion by Mr. Justice Douglas).

Upon receipt of this Court's mandate, the Court of Appeals remanded the case to the District Court. Since this Court's opinion clearly required the District Court to first decide the present effectiveness of the 1930 assessment work contests, the parties agreed to submit that issue for determination on the basis of the existing record, and that all other "issues as to the validity of the mining claims, other than as that validity may be affected by the validity of the administrative contest proceedings, are not at issue in these actions." (Stipulation filed 3/17/72).

After further briefing and oral argument, the trial court ruled for petitioners on three separate grounds: (1) Interior had rescinded the assessment work decisions in 1935; (2) from 1935 until the early 1960's, Interior consistently maintained that these old contest proceedings did not operate to render oil shale claims invalid and had adopted a regulation to that effect which could not be retroactively abrogated; and (3) Interior was estopped from asserting the effectiveness of those old proceedings. Accordingly, the District Court granted the *TOSCO* plaintiffs declaratory re-

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lief and directed Interior to commence reprocessing the other petitioners' patent applications (370 F.Supp. 108 (1973)). In short, the District Court ruled that Interior could not deny patents on the basis of the 1930 contests—as it had done in the *Union Oil* proceeding.

2. The Decision Below

Interior appealed and the issues were fully briefed and argued on the merits by both sides (on April 30, 1975). The Court of Appeals, however, declined to rule on those issues. Instead, it *sua sponte* issued an Order of Remand to the District Court instructing it to remand to Interior the cases involving petitioners who had filed patent applications with the direction that "Interior is to consider and rule upon all possible obstacles to the patenting of these claims" (Appendix, 6a). Since the *TOSCO* plaintiffs had not applied for patents, their case was simply placed in limbo by the Court of Appeals until after Interior concluded all proceedings in the other remanded cases.

The only justification offered by the Court of Appeals for its refusal to decide the current validity of the 1930 contest decisions, as it was directed to do by this Court, is that "good judicial husbandry demands that litigation be brought to a conclusion within a reasonable time frame." (Appendix, 4a). The Court of Appeals indicated that in its opinion "judicial economy" was best served by requiring all issues that could conceivably be raised concerning the validity of these mining claims to be litigated before ruling on the specific grounds given by Interior for rejecting them.[3]

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[3] The large number of issues and the lengthy time that could be required for their resolution is discussed *infra* at pages 16-21.

3. The Urgent Need for a Decision in This Case

This is a test case involving 97 oil shale mining claims. Its prompt resolution has been recognized as extremely important by the parties and both lower courts. However, by requiring the litigation of many issues which a definitive ruling would have rendered moot, the Court of Appeals' Order of Remand would greatly delay the ultimate resolution of this test case, would result in an immense waste of judicial and administrative resources and would impose tremendous, unnecessary expense on the parties. The practical effect of the Order of Remand will be to delay for an indefinite period a determination of the validity of claims to large tracts of oil shale land and thus further delay the development of this nationally important source of energy.

THE REASONS FOR GRANTING THE WRIT

1. The Decision Below Violates the Mandate of This Court

The refusal of the Court of Appeals to decide the merits of Interior's appeal from the District Court's decision that the 1930 assessment work contests were not currently valid, violates the mandate of this Court in *Hickel* v. *Oil Shale Corp.* In *Hickel*, this Court specified that on remand—to the lower courts, not to Interior—all questions as to the "current validity of those contests will be open, including the availability of judicial review at this time." This mandate clearly required the trial court to decide first the "current validity" issue. That it did. Indeed, Interior and petitioners stipulated that issue should be decided by the court on the fully developed record before it with Interior only reserving the right to raise other objections to the validity of the claims if the court ruled against

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it on this issue. However, when Interior appealed the trial court's decision, the Court of Appeals simply vacated it, thus leaving the parties where they started in the courts 12 years ago.

This Court did note in *Hickel* that if it should be determined that the assessment work contests were not "currently valid", Interior would not be foreclosed from subsequently raising other questions going to the validity of these mining claims. However, since those issues would be within the primary jurisdiction of Interior,[4] this Court obviously contemplated that the "current validity" issue would be decided first by the courts. It would not be appropriate or necessary to reach those other issues until it had been determined that the contest decisions were not currently valid. The refusal of the Court of Appeals to consider the merits of that issue before all other possible issues are adjudicated is thus inconsistent with this Court's mandate.[5]

It is well established that an inferior court has no power or authority to deviate from the mandate issued by a higher court. *Briggs* v. *Pennsylvania RR.*, 334 U.S. 304, 306 (1948). Indeed, this Court has repeatedly insisted that its mandates be strictly adhered to by the lower courts. *Utah Public Service Comm'n.* v. *El Paso Natural Gas Co.*, 395 U.S. 464 (1969); *United States* v. *E. I. DuPont deNemours & Co.*, 366 U.S. 316 (1961); *In re Sanford Fork and Tool Co.*, 160 U.S. 247 (1895); *Ex parte Sibbald* v. *United States*, 37 U.S. (12 Pet.) 488 (1838). This Court's mandate instructed

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[4] See, *e.g.*, *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963) (Opinion by Mr. Justice Douglas).

[5] The mandate in these actions specifically incorporates the opinion.

the lower courts to decide a specific issue. The District Court decided it, but the Court of Appeals vacated that decision and remanded the cases to the District Court with instructions not to decide that issue until whatever other issues might exist (whether or not raised heretofore by either party) had been litigated in administrative proceedings within Interior. Because of the importance of bringing this protracted litigation to a conclusion, this Court should now review the refusal of the Court of Appeals to decide the merits of the issue that *Hickel* specifically remanded to the lower courts for decision by them.

2. The Court of Appeals' Unjustified Refusal To Decide the Merits of This Case Warrants the Exercise of This Court's Supervisory Powers

(a) THE DECISION BELOW DISREGARDS THE LAW OF THIS CASE.

The essence of the Court of Appeals' decision must be that the issue of the current validity or effectiveness of the circa-1930 assessment work contests is not "ripe" for judicial review. However, the contrary has been established as the law of this case by the 1964 denial of Interior's motion to dismiss and the subsequent decisions on the merits, including this Court's 1970 decision in *Hickel*.

This Court necessarily concluded in *Hickel* that the Federal Courts had jurisdiction over the instant actions, *United States* v. *Haley*, 371 U.S. 18, 19 (1962); *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25, 29 (1917), and that the question of the present effectiveness of the 1930 decisions was "ripe" for judicial decision; *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-156 (1967); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967);

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cf. United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). The law of the case must be followed by the lower courts upon remand. *Minerals Separation, Ltd.* v. *Butte & Superior Mining Co.*, 250 U.S. 336 (1919); *Ex parte Sibbald* v. *United States, supra*; 1B Moore's *Federal Practice* ¶ 0.404 [10](2d ed. 1974).

The soundness of the determination of ripeness established as the law of this case is fully demonstrated by *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639 (1935), where this Court ruled on the precise issue that the Court of Appeals has determined is not yet "ripe" for decision. Though distinguished in *Hickel* with respect to whether Interior has subject matter jurisdiction over assessment work, *Virginia-Colorado* certainly remains a controlling precedent on the issue of "ripeness". The case involved an attack by the owner of unpatented oil shale claims on an administrative contest decision identical to those now relied on by Interior as conclusive against petitioners' mining claims. In its briefs to the Court of Appeals, Interior argued that even if it lacked jurisdiction to render its assessment work decisions, no relief should be granted to the claim owners since they could complain later in other forums—in effect, lack of ripeness. The Court of Appeals rejected this argument and affirmed the injunction the trial court had granted which barred Interior from using assessment work default as a basis for declaring the mining claims invalid. 69 F.2d 123 at 125 (1934). This Court, although noting Interior's authority to determine, in appropriate proceedings, invalidity by reason of fraud, abandonment or other defect, affirmed and by necessary implication thus upheld the lower court's view that the case was ripe for decision even though the claims involved might ulti-

mately prove to be invalid in some "appropriate proceeding".

This Court's specific instruction in *Hickel* that the lower courts should determine the "current validity" of the assessment work contests necessarily establishes that this issue is ripe for judicial determination. The District Court acted accordingly and decided the issue, but the Court of Appeals vacated that decision—not because the judgment it reviewed was in error, but because it deemed judicial decision of the issue inappropriate at this time. Since this Court has already established that this case is ripe for decision, it should grant the writ to rectify the Court of Appeals' refusal to follow the law of this case as laid down by this Court in *Hickel*.

(b) The Court of Appeals Erroneously Ignored Its Duty to Decide a Case Properly Before It.

Generally, if a Federal Court has jurisdiction over a case, it has a duty to decide it. *See Southwestern Sugar & Molasses Co.*, v. *River Terminals Corp.*, 360 U.S. 411, 414-415 (1959); *Meredith* v. *Winter Haven*, 320 U.S. 228, 234-35 (1943); *Wilcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). Only in exceptional circumstances is a court which has jurisdiction warranted in not exercising it. *See Meredith* v. *Winter Haven, supra* at 234-37. In this case the District Court properly exercised its jurisdiction and entered judgment. The Court of Appeals has simply refused to consider the merits of an appeal from a properly entered judgment.

Even if ripeness principles are applicable to an appeal from a proper final decision of a trial court, no ex-

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ceptional circumstances exist here to warrant their application. None of the factors that have led courts to conclude that ripeness was lacking is present.[6] Final administrative action has been taken, declaring petitioners' mining claims invalid; Interior need do nothing further for petitioners to lose their claims. Moreover, there is no other challenge or proceeding against petitioners' mining claims pending in Interior; the entire present controversy is present here. Indeed, the District Court in 1964, before the first round of appeals in this case, expressly held that the complaint in *TOSCO* set forth a justiciable controversy for precisely those reasons. 235 F.Supp. 606, 608.

There is nothing unusual about the fact that if Interior's denial of patents on the basis of the 1930 contests is ruled invalid, Interior could then institute further proceedings on other grounds and perhaps reach the same end result. When an administrative agency or official has acted finally on an erroneous ground, it is frequently true that, after reversal, the agency or official may later reach the same final result on other grounds or on other facts. The Court explicitly recognized this possibility in *Wilbur* v. *Krushnic,* 280 U.S. 306, 316 (1930) (ruling that Interior had improperly rejected a patent application for an oil shale claim, but modifying the lower courts' order that Interior issue a patent, so as to permit further proceedings), and in *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U.S. 639 (1935) (discussed on page 13, *supra*). *See also N.L.R.B.* v. *Food Store Employees Local 347, Amalgamated Meat Cutters,* 417 U.S. 1 (1974); *Konigs-*

[6] *See generally,* 3 K. Davis, *Administrative Law Treatise* § 21.10 (1958, Supp. 1970).

berg v. *State Bar of California*, 366 U.S. 36 (1961); *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411 (1959). Thus, even if the law of this case did not already establish that this case was ripe for judicial determination, the court below was not justified in failing to render a decision on the merits of the issues presented to it.

(c) The Court of Appeals' Decision Will Cause Unnecessary Litigation and Delay in This Already Protracted Test Case.

Although there conceivably may be numerous reasons why a particular oil shale claim may not be valid, Interior's decision in the early 1960's to challenge the validity and patentability of any and all oil shale claims raised only two major issues. The first issue, which is common to all but a handful of the claims, is whether the 1930 assessment work contests can be used to invalidate oil shale claims. The second issue, which is common to all claims, is whether oil shale has ever satisfied the value requirements of the mining laws. After many years of litigation, both issues are now in the courts in test cases that are ripe for definitive rulings: the first issue in this case and the second issue in *Shell Oil Co., et al.* v. *Morton,* Civil Action No. 74-F-739 (D. Colo.), in which cross motions for summary judgment have been filed and briefed.

Definitive rulings on these two test cases, if forthcoming from the courts, will avoid a great deal of further litigation and delay. If Interior wins on the 1930 assessment work contest issue, title to much of the land in question will, in effect, be settled in its favor, without further litigation and irrespective of how the value issue is ultimately resolved. If Interior wins on the value issue, title to all of the land in question would, as a prac-

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tical matter be settled. If Interior losses both test cases, it may decide not to pursue other possible objections that would be peculiar to each of a vast number of individual claims, or it might be willing to work out some settlement, thereby avoiding further litigation.[7]

Even if Interior were to decide to litigate further after losing both test cases, the scope of such litigation would be greatly reduced by definitive rulings on these two issues. For example, affirmance of the District Court's rulings in this case that Interior in 1935 rescinded all the prior adverse assessment work decisions should preclude litigation as to the original validity of those decisions. A determination that Interior is bound by and cannot retroactively change its own regulation that assessment work is solely a matter between rival (or "adverse") private claimants should also preclude the possibility of extensive *do novo* litigation with respect to the amount of annual work performed (or not performed) while that regulation was in effect, the value of work performed, whether the work "benefitted" development of claims, and other questions that gave rise to extensive litigation in the 1920's when

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[7] Interior has publicly stated that it hopes that definitive court rulings in these two test cases will resolve most questions as to the validity of oil shale claims, and that whether any other challenges may be raised would depend on circumstances peculiar to a given claim. *E.g., Hearing on Oil Shale Before House Committee on Interior and Insular Affairs*, 89th Cong., 1st Sess., pp. 40-42 (testimony of Under Secretary Carver), (1965); *Hearings Pursuant to S. Res. 26 Before Subcommittee on Antitrust and Monopoly of Senate Judiciary Committee*, 90th Cong., 1st Sess., pp. 188 (testimony by Solicitor's Office that court decisions in the two test cases "would clarify the status of probably all or a great majority of the pre-1920 claims"), 280 (testimony of Secretary Udall that he had brought the test actions "to secure authoritative decisions as to the validity of long-standing oil shale claims. . . .") (1967).

Interior was challenging many oil shale mining claims on a wide variety of assessment work related issues.[8]

The decision below that all possible issues between claimants and Interior must be litigated before there is a judicial determination of any of them clearly conflicts with this Court's holding in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411 (1959), that a Court of Appeals must pass upon potentially dispositive issues as to which the expert assistance of an administrative agency is not relevant before invoking the process of that agency to resolve other issues. The rationale given by this Court for that decision is equally applicable here:

> "a present ruling on those other questions [ripe for judicial decision] might entirely obviate the necessity for proceedings in the Commission which would further delay the final disposition of this already protracted litigation." (*id.* at 415).

While a definitive ruling on the assessment work contest issues would avoid much further litigation and thus expedite clarification of title, the Court of Appeals' decision to remand this case to Interior would maximize subsequent litigation and increase delay. Since the lower court's Order of Remand requires Interior to raise all objections it might have to these claims, Interior will obviously be inclined to include in ensuing administrative proceedings any and every factual or legal issue that might conceivably have a bearing on the validity or patentability of any of these oil shale claims,

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[8] *See, e.g., Standard Shales Products Co.*, 52 I.D. 522 (1928); *Instructions, Assessment Work on Oil Shale Claims*, 52 I.D. 334 (1928); *Instructions, Assessment Work on Oil Shale Claims*, 52 I.D. 333 (1927); *Emil L. Krushnic*, 52 I.D. 282 (1927), *On Rehearing*, 52 I.D. 295 (1928).

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even though such issues would not be deemed worth pursuing separately if Interior had lost both of its general test cases. Many such potential issues would be peculiar to each particular claim, and the litigation could become exceedingly complex and protracted, especially since the Order of Remand contemplates a comprehensive proceeding involving a large number of oil shale claims.[9]

The sheer volume of such further litigation is staggering. *Shell Oil Co.*, the test case on the value issue now pending in the District Court, provides some idea of the magnitude of litigation that would be forthcoming. The case arose out of two patent applications filed in 1958 and 1960 for a total of only nine mining claims. Interior conducted field investigations over several years, and then filed two contest complaints in September, 1964. The contests were thereafter prosecuted on a consolidated basis. Pre-trial discovery and efforts to narrow issues for trial and to resolve procedural issues took over two and one-half years. The contests

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[9] Interior's *Union Oil* decisions in 1964 and 1965 involved 257 mining claims. All are the subject of suits for judicial review, including six actions other than the four consolidated ones now before the Court. In the six other actions, the District Court for the District of Colorado decided on March 24, 1967, with the agreement of the parties, that it was "in the interest of proper judicial administration not to proceed with trials" until the instant cases were finally decided. In 1974 Interior opposed a motion to reopen one of these actions (*Hugg* v. *Udall*, C.A. No. 9252) on the ground that a final ruling in the instant cases would be dispositive.

In addition to the 257 claims in *Union Oil*, the *TOSCO* action involves 75 claims, and *Amerada Oil Co., et al.* v. *Morton*, C.A. No. C-4361 (D.Colo.), involves 50 other shale claims declared invalid on assessment work grounds. By order of June 3, 1974, *Amerada* is being held in abeyance pending final decision in these consolidated cases.

came on for hearing before an independent Hearing Examiner (now Administrative Law Judge) starting on June 20, 1967, and ending in November, 1967. The basic facts were not materially in dispute, and a comprehensive record was rather expeditiously compiled. In thirty-eight hearing days, twenty-six witnesses testified, generally as experts, of whom twenty-three were witnesses called by Interior. One thousand, seven hundred and thirty-six exhibits, often voluminous, were entered into evidence. The hearing transcript aggregated 5,248 pages. Two years were required for briefing to the Examiner; Interior filed briefs aggregating 2,383 pages, and the claim owners filed briefs and proposed findings of fact aggregating over 2,000 pages.

On April 17, 1970, the Examiner issued a ninety-six page opinion finding three claims invalid and six valid under Interior's established rules for discovery of a valuable mineral on an oil shale claim. Interior promptly appealed to its own Board of Land Appeals. Briefing to the Board was completed by September, 1970, but although Interior indicated the case was important and an expeditious ruling was desired, the Board took almost four years before rendering a decision, on June 28, 1974. Thus, it took about fourteen years for administrative investigation and adjudication of value issues involving nine oil shale claims.

The Order of Remand also apparently contemplates that the long litigated issues respecting the 1930 assessment work contests be fully retried, indeed, be more amply tried, with an "opportunity to correct any existing procedural errors." [10] This order is made without

[10] To avoid the procedural errors of which petitioners complain in *Union Oil*, the combination of prosecutorial and adjudicative functions and denial of a hearing, it would be necessary to start from the very beginning.

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any finding that procedural error occurred or that they were prejudicial. A number of other assessment work issues could also be injected into such proceedings. Much if not all of that litigation would be wholly unnecessary if the Court of Appeals were to decide the issues now ripe for decision.[11]

As the lower court's Order of Remand notes, there is no patent application proceeding in Interior to which the mining claims in the *TOSCO* case could be remanded. The *TOSCO* petitioners have sought to remove the assessment work contest cloud on their title in the most expeditious way possible. The right to bring a declaratory judgment action to obtain such relief is well established (*see, e.g., United States* v. *Fisher-Otis Co.*, 496 F.2d 1146 (10th Cir 1974); *Scott-Burr Stores Corp.* v. *Wilcox*, 194 F.2d 989 (5th Cir. 1952) and has been sustained for twelve years by the courts in this very case. The *TOSCO* petitioners' right of resort to the courts should not now be barred by imposing a requirement that they first undergo the considerable effort, expense and delay of preparing and prosecuting patent applications, which Interior surely would reject on the same grounds announced in *Union Oil* in 1964, which led to the initiation of the *TOSCO* action.

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[11] In addition, we note that many of the claim owners have limited resources and are of advanced years; further litigation would be very onerous. Indeed, many of the litigants have died since 1964, including Penelope Chase Brown. Her family invested over $350,000 in oil shale in the 1920's and have had an interest in the four Oyler claims in this case since then. These claims are now leased to TOSCO with an option to purchase. TOSCO would have purchased them, for $150,000, upon patenting. Aside from the Oyler claims, Mrs. Brown's estate was valued at $2,044.51.

CONCLUSION

Petitioners' title to their mining claims should be resolved as expeditiously as possible. This would remove Interior's present attacks as clouds upon the claims and as impediments to the development of this crucial energy reserve. The decision of the Court of Appeals violates the mandate of this Court and charts a course for this already protracted case that will delay indefinitely its final resolution. For those reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM—SEPTEMBER 22, 1975

Nos. 74-1344, 74-1345, 74-1346, 74-1347
(Consolidated cases)

THE OIL SHALE CORPORATION; ENERGY RESOURCES TECHNOLOGY LAND, INC.; JOSEPH B. UMPLEBY; WASATCH DEVELOPMENT CO.; BARNETT T. NAPIER; GRACE A. SAVAGE; JOAN L. SAVAGE; MAUDE B. FARNUM; ST. CLAIR NAPIER CATLIN; WILLIAM H. FARNUM, JR.; JOHN R. FARNUM; JOHN W. SAVAGE; NEIL S. MINCER; GARDNER C. CATLIN; ELIZABETH YOUNG FARNUM HINDS; and PENELOPE CHASE BROWN, individually and as Trustee,

Plaintiffs-Appellees,

v.

ROGERS C. B. MORTON, Secretary of the Interior,

Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(D.C. 8680, 8685, 8691, 9202)

Before The Honorable Delmas C. Hill, The Honorable William J. Holloway, Jr., and The Honorable James E. Barrett, Circuit Judges

Thomas L. McKevitt (Wallace H. Johnson, Assistant Attorney General; James L. Treece, United States Attorney, Denver, Colorado; Edmund B. Clark, Robert L. Klarquist, Attorneys, Department of Justice, on the brief), Washington, D. C., for Defendant-Appellant United States.

Fowler Hamilton (Warren O. Martin, Denver, Colorado, on the brief for Plaintiffs-Appellees in 74-1345; David G. Manter, Denver, Colorado, on the brief for Plaintiffs-Appellees in 74-1346; James B. Dean, Denver, Colorado; Richard W. Hulbert, New York, New York; and Donald L. Morgan, Washington, D. C., on the brief for Plaintiffs-Appellees in 74-1344 and 74-1347), New York, New York, for Plaintiffs-Appellees.

Before HILL, HOLLOWAY and BARRETT, United States Circuit Judges.

PER CURIAM.

Order of Remand

The first stage of this litigation focused on a very narrow issue—the Interior Department's subject matter jurisdiction over contests involving the performance of assessment work. That issue was ultimately decided adversely to the claimants by the Supreme Court in Hickel v. Oil Shale Corp., 400 U.S. 48 (1970). The Supreme Court, in reversing and remanding, provided the following instructions:

> Respondents [claimants-appellees] rely upon the response of the Department of the Interior to the Virginia-Colorado case in which the Secretary declared the contest in that case to be "void." He also declared that "other Departmental decisions in conflict with this decision are hereby overruled." This decision, they argue, nullified the previous contest proceedings in which their claims were voided. Moreover, they contend that this administrative rule of 35 years, upon which the Department itself has relied, may not now be retroactively changed. In addition, they claim that these contest decisions, if still valid, are subject to direct judicial review at this time, testing both substantive and procedural errors, such as lack of notice.

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> These contentions present questions not decided below. Therefore, on remand all issues relevant to the current validity of those contest proceedings will be open, including the availability of judicial review at this time. To the extent that they are found void, not controlling, or subject to review, all issues relevant to the invalidity of the claims will be open, including inadequate assessment work, abandonment, fraud, and the like. Likewise all issues concerning the time, amount, and nature of the assessment work will be open so that the claimants will have an opportunity to bring their claims within the narrow ambit of Krushnic and Virginia-Colorado, as we have construed and limited these opinions.

In the instant matter before this Court, again a very small matter in the total controversy has been adjudicated. Relying on three substantive grounds, the trial court held that the assessment work contests could not be used to bar patents on these claims. The substantive grounds relied on by the trial court were (1) the vacating effect of the *Shale Oil* decision; (2) the "rule" of Interior allowing claims which had previously been declared void in the assessment work contests to be patented; and (3) estoppel. Grounds 1 and 2 relate directly to issues mentioned by the Supreme Court in its mandate; estoppel would also be encompassed within the language "all issues relevant to the current validity of those contest proceedings will be open . . . ." The trial court also found Interior had committed procedural errors in the processing of patent applications for the claimants in 74-1345, 74-1346 and 74-1347. The court held these procedural errors, in addition to the incorrect substantive decisions, warranted a remand to Interior for reprocessing.

The trial court did not reach the issue of the propriety of direct judicial review of possible substantive and procedural errors (including lack of notice) in the old assessment work proceedings. Having determined the assessment work contests could not be the basis for barring these

patents, the trial court held it did not need to consider if direct judicial review of those proceedings was possible at this time or whether any errors had been committed in those proceedings.

The assessment work contests are simply one ground for challenging the claimants' right to patents. The trial court determined the contests could not be used to deny these claimants' patents. That meant the court reached consideration of the second prong of the Supreme Court's mandate—the " . . . other issues relevant to invalidity of these claims . . . including inadequate assessment work, abandonment, fraud, and the like." These possible obstacles have not been the subject of any administrative hearing or adjudication. It should be noted that the parties apparently stipulated that the issues of " . . . abandonment, fraud, lack of a valid discovery or other critical infirmity . . . " would not be considered by the trial court. Oil Shale Corp. v. Morton, 370 F.Supp. 108, 127, n.24 (D. Colo. 1973). In cases 74-1345, 74-1346 and 74-1347, where the claimants had applied for patents and been denied them, the trial court remanded the cases to Interior for reprocessing of the patent applications and ordered Interior "to consider and rule upon all possible obstacles to the patenting of these claims." That reprocessing has not begun pending this appeal's outcome.

This litigation has been protracted. The claimants in this case who have sought patents did so from 1955 to 1962. The Secretary of the Interior decided the matter, on appeal, adversely to the claimants in 1964. Union Oil Co., 71 I.D. 169. Litigation to compel Interior to issue the patents to the denied claimants and to get declaratory relief for claimants who have not sought patents on their claims was instigated in the district court in 1964 and 1965. The end to this litigation is not in sight.

Good judicial husbandry demands that litigation be brought to a conclusion within a reasonable time frame.

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The energy situation in which this country finds itself compels a sense of urgency be brought to this action by this Court and the litigants. As the case now stands, many issues concerning the ultimate validity of these claims remain for determination. Should this Court or the Supreme Court determine that all three substantive bases relied upon by the trial court did not prevent use of assessment work contests to bar these claims, issues concerning the effect of these very same contests would remain: whether direct judicial review of them for substantive and procedural errors is possible at this time; and whether any errors occurred. Affirmance of the decision below would not prevent the assertion of the other bases for invalidity. Consequently, the validity or invalidity of the claims will not be determined by any decision this Court or the Supreme Court could make with the case in its present posture. In the hope that a speedier end can be brought to this important litigation, and by means of this Court's inherent power to regulate litigation in the interest of judicial economy, the following order of remand is hereby entered.

No. 74-1344

1. The case is remanded to the district court.

2. As claimants have not applied for patents, there can be no remand to Interior for ultimate determination of these claims. However, the Court suggests that these claimants apply for patents and, if such applications are made, Interior handle the matters on an expedited basis, allowing a consolidation, as appropriate, of these cases with the other remanded cases. In those proceedings, any and all bases for invalidity of the claims which Interior should desire to rely upon must be asserted. Also, with reference to the issue of estoppel, the Department shall receive all competent evidence presented upon the qustion of individ-

ual reliance by claimants upon the prior actions of Interior regarding the effect of the assessment work contests.

3. Following any proceedings in Interior, the district court shall supplement its present findings of fact and conclusions of law as needed to dispose of the new matters presented. The district court shall proceed, after administrative proceedings are completed in all the remanded cases —whether or not patents are applied for—to determine the propriety of judicial review of the assessment contents *and* to determine if substantive or procedural errors occurred in those proceedings. This latter determination may require the taking of additional evidence. If no proceedings have been conducted in Interior as suggested above, the district court shall, following determinations by Interior in the other remanded cases, receive all competent evidence presented upon the question of individual reliance by claimants upon the prior actions of Interior regarding the effect of the assessment work contests. This evidence, of course, is relevant to the estoppel issue.

Nos. 74-1345, 74-1346 and 74-1347

1. These cases are remanded to the district court and, in turn, that court shall remand the matter to the Department of the Interior with the following directions:

a. Interior is to consider and rule upon all possible obstacles to the patenting of these claims;

b. Interior is requested to handle these matters in an expedited fashion;

c. with reference to the issue of estoppel, the Department shall receive all competent evidence presented upon the question of individual reliance by claimants upon the prior actions of Interior regarding the effect of the assessment work contests; and

d. Interior will have the opportunity to correct any existing procedural errors.

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2. Following the completion of the administrative process, the district court shall supplement its present findings of fact and conclusions of law as needed to dispose of any new matters which may be presented. The district court shall also determine whether present judicial review of the assessment work contests is proper *and* whether substantive or procedural errors occurred in those proceedings. This latter determination may require the taking of additional evidence.

3. Should Interior not desire to assert any additional bases of invalidity against any of these claims (or at least against those claims involved in 74-1345, 74-1346 and 74-1347), a stipulation of the parties may be entered and the district court may proceed to complete the remainder of its remanded task concerning the propriety of judicial review. That remanded task, in the event of such a stipulation, also shall include the receiving of all competent evidence presented upon the question of individual reliance by claimants upon the prior actions of Interior regarding the effect of the assessment work contests.

Therefore, the judgments appealed from are vacated and the cases are remanded in accordance herewith. However, we retain jurisdiction of the cases pending compliance with this mandate and for such other purposes as we deem appropriate, including a final determination of the cases upon the merits.